No. 95-581

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

SEATTLE, LAKE SHORE AND EASTERN RAILROAD, INC.,

Petitioner,

v.

INTERSTATE COMMERCE COMMISSION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

OPPOSITION TO PETITION FOR CERTIORARI BY CITY OF SEATTLE, BURLINGTON NORTHERN RAILROAD COMPANY AND RAILS TO TRAILS CONSERVANCY

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QUESTIONS PRESENTED

1. Is a substantial federal question posed, or is there any significant conflict with decisions of this Court or between the circuits, in regard to the Interstate Commerce Commission's (ICC's) rulings that the Seattle, Lake Shore and Eastern Railroad's (SLSER's) $10 nuisance offer for highly valuable real estate along the Ship Canal in Seattle was not "bona fide" for purposes of 49 U.S.C. § 10905?

2. Similarly, is there a substantial federal question, or conflict with a decision of this Court or between the circuits, in ICC's finding that SLSER (a shell corporation with no railroad experience) was not "financially responsible?"

PARTIES TO THE PROCEEDING

Petitioner is Seattle, Lake Shore and Eastern Railroad, Inc., a Washington corporation.

Respondents are Interstate Commerce Commission and United States of America, and intervener-respondents are City of Seattle, Rails to Trails Conservancy (a D.C. non-profit corporation), and Burlington Northern Railroad Company ("BN"), a Delaware corporation.

Pursuant to Supreme Court Rule 29.1, BN provides the following disclosure:

(1) Burlington Northern Santa Fe Corporation ("BNSF") is a corporation organized pursuant to the laws of the State of Delaware and is BN's indirect parent company.

(2) Burlington Northern Inc. ("BNI") is a corporation organized pursuant to the laws of the State of Delaware and is a wholly-owned subsidiary of BNSF. BN is a wholly-owned subsidiary of BNI.

(3) BN's non-wholly owned subsidiaries include: Kansas City Terminal Railway Company, TTX Company, The Wichita Union Terminal Railway Company, Longview Switching Company, Terminal Railroad Association of St. Louis, The Belt Railway Company of Chicago, M T Properties, Inc., Iowa Transfer Railway Company, Portland Terminal Railroad Company, Paducah & Illinois Railroad Company, Houston Belt & Terminal Company, and Camas Prairie Railway Company.

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OPPOSITION TO PETITION FOR CERTIORARI BY CITY OF SEATTLE, BURLINGTON NORTHERN RAILROAD COMPANY and RAILS TO TRAILS CONSERVANCY

City of Seattle ("City"), Burlington Northern Railroad ("BN"), and Rails to Trails Conservancy ("RTC"),

interveners below, oppose the petition for certiorari filed by Seattle, Lake Shore and Eastern Railroad, Inc. ("SLSER").

STATEMENT OF THE CASE

At all times relevant herein, the Interstate Commerce Commission has regulated abandonment of freight railroad lines pursuant to 49 U.S.C. § 10903-05 and exemption authority found at 49 U.S.C. § 10505. Under § 10505, ICC may authorize abandonments through exemption from all or parts of regulation otherwise required by 49 U.S.C. § 10903-04.

Faced with a lack of traffic on a rail line along a portion of Seattle's Ship Canal and Lake Union, BN petitioned for an exempt abandonment authorization from the Interstate Commerce Commission (ICC) pursuant to 49 U.S.C. § 10505 and 49 C.F.R. Part 1121. The line in question encompasses highly desirable real estate through Pacific Lutheran University, a developing commercial and residential area along Lake Union, and the proposed Seattle Commons park. No shipper or potential shipper objected.

City of Seattle applied to ICC to negotiate for the acquisition of the line for railbanking and interim trail use under 16 U.S.C. § 1247(d) in lieu of abandonment, in accordance with 49 C.F.R. § 1152.29 and § 1121.4(j). BN assented to the issuance of a "Notice of Interim Trail Use" ("NITU") in lieu of a notice of abandonment. ICC duly issued a NITU.

Petitioner SLSER and an entity called Lake Union Terminal Railroad (LUT)[1] then invoked the "offer of financial assistance" ("OFA") provisions of 49 U.S.C. § 10905. Section 10905, a mechanism whereby ICC may order the involuntary sale of a rail line by a railroad to a third party, is designed to preserve lines for continued freight railroad purposes. As City and RTC noted in their filings before the ICC, SLSER was organized and controlled by one Richard Welsh, the Executive Director of an organization primarily devoted to opposing trails.[2] City and RTC objected to the SLSER invocation of § 10905 as a ruse; specifically, the SLSER invocation of § 10905 was an apparent effort to undermine the proposed transaction to preserve the line for railbanking and trail purposes.

A party invoking § 10905 in a "petition for exemption" proceeding (49 U.S.C. § 10505 and 49 C.F.R. Part 1121) must first file a notice of intent to offer (49 C.F.R. § 1152.27(c)(2)) and request valuation information from the railroad, because such information generally is not required in exempt abandonment proceedings. The timely filing of a notice of intent to offer stays the proceeding until

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[1] Both SLSER and LUT were represented by the same counsel before the ICC and filed virtually identical pleadings throughout. LUT was evidently a group of excursion railroad buffs who sought the eastern-most portion of the line for excursion rail purposes or for purposes of parking privately-owned passenger cars. The LUT portion would have no connection to the national freight rail section, except over the SLSER portion.

[2] LUT, not a party here, was believed to be organized by excursion railroad buffs.

the railroad responds to informational requests and the party filing the notice of intent has had an opportunity to make an offer.

Once an offer is made, 49 U.S.C. § 10905(d) and the Commission's regulations at 49 C.F.R. § 1152.27(e)(2) require the agency to determine if the offer is bona fide (likely to cover the acquisition cost of the line) and if the party making the offer is "financially responsible," *e.g.*, has assets sufficient likely to cover such costs.

In response to the SLSER/LUT notices of intent to invoke, BN supplied appraisals and other detailed evidence demonstrating that the property in question was worth in excess of $1,000,000. Additionally, as City of Seattle and RTC indicated in their filings with the Commission, the City offered BN $600,000 for the property, and RTC offered BN $175,000 to acquire the property for railbanking/interim trail use.

SLSER nonetheless offered only token consideration -- a mere $10 for the western-most 2000 feet of the line near the university.[3] LUT similarly offered only $10 for the eastern-most three miles. As evidence of financial responsibility, SLSER represented that its sole incorporator (the already mentioned Richard Welsh) had placed about $47,000 face value in bonds in an account on a given day. LUT provided evidence of some $100,000 on deposit on a

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[3] No active shipper could be served from this 2000 foot line, and SLSER never demonstrated how it could operate railroad equipment on the line given its configuration.

given day from one of its incorporators. BN objected to the offers, and to the adequacy of the amounts available to SLSER and LUT to purchase the line and to operate it for two years as required by 49 U.S.C. § 10905. Pursuant to delegated authority, and based on the evidence tendered by BN, the Director of ICC's Office of Proceedings found that the SLSER and LUT offers were not "bona fide" (i.e., not likely to cover acquisition costs). The Director extended the effective date of the NITU to afford SLSER and LUT thirty days time to appeal to the full Commission. *Burlington Northern -- Exemption -- in King County, Wa*, AB-6 (Sub-No. 357X), served March 16, 1994 (appendix D to SLSER Cert. Pet.).

SLSER and LUT appealed the dismissal to the full commission, which unanimously affirmed. The Commission noted, among other things, that RTC had offered $175,000 for the property, and that the City had offered $600,000. The full Commission found that the trivial $10 offers were not "bona fide" and further that SLSER and LUT had failed to demonstrate financial responsibility to acquire and to operate the property. *Burlington Northern -- Exemption -- in King County, Wa*, AB-6 (Sub-No. 357X), served April 21, 1994 (appendix C to SLSER Cert. Pet.).

Neither SLSER nor LUT sought a stay of the Commission's decision. The NITU authorizing interim trail use/railbanking of the corridor became effective.

SLSER and LUT petitioned for review in the U.S. Court of Appeals for the District of Columbia Circuit. The D.C. Circuit denied review in a brief per curiam decision

issued on May 10, 1995. On July 3, 1995, the D.C. Circuit denied a petition for rehearing. SLSER now petitions this Court for a writ of certiorari. LUT does not seek further review.

Pursuant to 28 U.S.C. § 2349(b) (applicable to judicial review of ICC orders per 28 U.S.C. § 2321), there is no automatic stay of ICC orders when a party petitions a court for review. Since neither SLSER nor LUT sought a stay pending further review, the NITU issued by ICC applicable to the corridor has remained effective. City of Seattle has subsequently purchased the corridor in question from BN pursuant to the NITU for $975,000 and the assumption of a variety of BN obligations (valued in excess of $1,000,000) to restore certain city streets traversed by BN rail lines. The actual price is thus over 100,000 times the "offers" of either SLSER or LUT, and over 10 times the value of the assets of SLSER or LUT combined.

REASONS FOR DENYING THE WRIT

I. THERE IS NO SUBSTANTIAL FEDERAL QUESTION RAISED BY SLSER

A. No Substantial Question Is Presented as to the Finding that the Token Offer Was Not Bona Fide

Under 49 U.S.C. § 10905(d) and ICC's implementing regulation (49 C.F.R. § 1152.27(e)(2)), ICC makes a preliminary finding before embarking on a full-fledged valuation proceeding. ICC first determines whether an

"offer of financial assistance" is "bona fide" and whether the party filing it is "financially responsible." It makes no sense to waste scarce agency resources on a lengthy valuation proceeding, or to unduly delay the relief sought by the railroad, if the offering party fails to show that its offer is "bona fide" or if the offering party lacks the resources to pay the likely purchase price of a rail line and to operate it responsibly.

ICC properly found that neither the SLSER nor the LUT offer was "bona fide." As City and RTC pointed out below, petitioner SLSER is effectively the alter ego of one Richard Welsh. Mr. Welsh is the Executive Director of the National Association of Reversionary Property Owners (NARPO). The principal objective of NARPO is to oppose railbanking and trail use. Neither Mr. Welsh, nor NARPO, nor SLSER have any experience operating a railroad, and, as noted, no shipper objected to BN's proposed termination of service. The evidence below supports the conclusion that invocation of the OFA procedures was merely a sham to frustrate long established plans of City. This itself supports ICC's determination that the SLSER offer was not bona fide.

Additionally, other evidence on the record amply supports ICC's conclusion that the SLSER/LUT offers were not bona fide. BN supplied extensive evidence of value (appraisals and title information) indicating a value of the property (real estate, rail and ties) in the millions of dollars. SLSER nevertheless filed an "Offer of Financial Assistance" proposing to pay only $10 for some 2000 feet of waterfront property adjacent to a university. This offer not only is vastly below the amount indicated in BN's valuation

information, but also a minuscule fraction of written offers tendered by City of Seattle ($600,000 cash in addition to assumption of liabilities) and RTC ($175,000 cash).

SLSER focusses on references made by ICC to the RTC offer as representing the lower range of value. SLSER claims, in effect, that ICC should have taken evidence on whether RTC's offer was bona fide. But BN never contested the bona fides of RTC's offer.[4] BN did contest SLSER's offer, not only because it was too low, but also because of the recent vintage and apparent inexperience of SLSER. In any event, City of Seattle offered $600,000 plus the assumption of liabilities. Under the circumstances, there was no reason for ICC to dispute the RTC offer as an indication of the lower range of value; reliance on the RTC offer as indicative of the lowest range actually favors SLSER. Finally, even if there were an error in ICC's reliance on the RTC offer, it was harmless (and certainly not rising to the level of a substantial federal question) because the City acquired the property for $975,000 plus substantial liability assumptions.[5] As ICC determined, clearly an offer of $10 is not "likely to cover ...[t]he acquisition cost" of the line as required by § 10905(d) and the applicable regulation.

SLSER's bald claim that ICC's disposition conflicts with rail transportation policy declared in 49 U.S.C. §

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[4] RTC has acquired many rail properties, including BN properties, pursuant to such offers, and has never defaulted.

[5] In fact, City, BN and RTC suggest that the entire matter is, in effect, moot. The $975,000 (plus liability assumptions) demonstrates that $10 was unquestionably not bona fide.

10101a, and in particular of the development of a "sound rail system" is disingenuous. SLSER Pet. at 10. ICC would clearly be acting in a fashion inconsistent with a "sound rail system" if it forced railroads into prolonged valuation proceedings on the basis of sham offers, such as that of SLSER, to acquire clearly valuable lines for token consideration. Nothing in §10101a suggests that it is an ICC duty to trivialize railroad assets; to the contrary, § 10101a is designed to foster economic viability on the part of the national freight rail industry. In general, § 10101a requires ICC to reduce delays and unwarranted regulatory barriers to exit.

B. SLSER's Uncontested Lack of Financial Responsibility Justifies the Result Below

Wholly apart from the lack of any substantial question with respect to ICC's finding that SLSER's token offer was not bona fide, ICC found that SLSER was not financially responsible. SLSER does not appear to contest this finding in its petition for certiorari. This constitutes independent grounds for upholding ICC's ruling below, and underscores the insubstantiality of the questions tendered to this Court by petitioner SLSER.

II. THERE IS NO CONFLICT JUSTIFYING FURTHER REVIEW BY THIS COURT

SLSER fails to demonstrate any conflict between the ruling below and any decision of this Court, any other circuit, or indeed any conceivably relevant tribunal.

SLSER argues that ICC acted contrary to *Sharp v. U.S.*, 191 U.S. 341 (1903) in allowing an unaccepted offer to establish fair market value for abandoned railroad properties. This is specious. ICC did not find or claim that the RTC offer established the fair market value of abandoned railroad properties. The agency merely found that the RTC offer (in combination with the City offer and BN's extensive evidence) indicated a much different range of likely value than SLSER's $10 offer. In other words, the RTC offer (in conjunction with other evidence) was considered only for the purpose of determining whether SLSER's nugatory offer was so spurious as to fail to meet the "bona fide" requirement.

SLSER appears to argue that the D.C. Circuit decision below conflicts with another D.C. Circuit decision; namely, *Iowa Terminal Railroad v. ICC*, 853 F.2d 965 (D.C. Cir. 1988). In *Iowa Terminal*, the D.C. Circuit reversed ICC for failing to give any weight to an unaccepted offer from a third party in valuing a rail corridor. ICC's action below was obviously fully consistent with, and indeed required by, *Iowa Terminal*.

SLSER suggests that *Iowa Terminal* requires that property which a railroad has agreed to donate for public use be valued at zero in a § 10905 proceeding. Whether this holding by *Iowa Terminal* is or is not correct is beside the point because it has nothing to do with this case. More specifically, SLSER's far-fetched claims that BN had previously agreed to donate the line to the City (thus allegedly rendering its true value to BN as zero) is factually incorrect and not supported by the record. BN had previously agreed to *exchange* a thirty foot width of the

corridor to the City if the City in turn assumed extensive BN crossing liabilities. This is hardly a "donation." But in any event, the corridor is wider than thirty feet. The City agreed that if it wished the remainder of the corridor, it would have to compensate BN. SLSER (and LUT) sought the entire width of the corridor, as did the City and RTC. Obviously the remaining width of the corridor was worth a great deal. RTC offered $175,000. The City offered $600,000, and eventually paid almost $1,000,000 for it, over and above the liability assumptions. In short, there was never any agreement to donate the corridor to anyone. SLSER's effort to contrive a conflict with *Iowa Terminal* is smoke and mirrors. The D.C. Circuit rejected the notion of a conflict within itself when it denied rehearing.[6]

Finally, SLSER argues that ICC's reliance on the RTC offer is inconsistent with the Commission's subsequent decision in *Wyoming and Colorado Railroad Co. -- Abandonment Exemption -- Jackson County, Co.*, AB-307 (Sub-no. 2X) (unpublished), served September 15, 1995. One is hard pressed to ascertain how an alleged

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[6] SLSER also seems to intimate that the decision below conflicts with *Chicago & N.W. T. Co.*, 678 F.2d 665 (7th Cir. 1982), insofar as the Seventh Circuit held that land to which the railroad lacks marketable title is properly valued at zero for § 10905 purposes. SLSER Pet. at 12. This claim of conflict appears to be another manifestation of SLSER's erroneous contention that BN had agreed to donate the corridor (ergo no alleged value to BN), and is wrong for the same reason that SLSER's reliance on *Iowa Terminal* is wrong. Clearly BN had sufficient marketable title to valuable property to beget not only substantial offers, but also a $975,000 cash payment from the City, in addition to liability assumptions.

inconsistency between a judicially reviewed ICC decision and another as yet unreviewed agency decision merits Supreme Court review. But aside from this point, the ICC explains in the *Wyoming and Colorado* decision that it *does* accept third party offers as evidence "where [the third party offer] 'demonstrated a significant understatement in the [§10905] offeror's appraisal." *Id.*, 1995 ICC Lexis 238 at *17, citing *Portland Traction -- Abandonment Exemption -- Multnomah and Clackamas Counties, OR*, AB-225 (Sub-no. 2X) (unpublished), served Jan. 10, 1990), slip op at 5. Here the RTC offer, and the City offer, demonstrated a gross understatement in SLSER's valuation (SLSER never adduced an appraisal). There is thus no inconsistency between ICC's decision below and ICC's decision in *Wyoming and Colorado*.

CONCLUSION

SLSER's petition for certiorari does nothing more than carp at factual findings supported by the record, and made by the agency charged with expertise in such railroad valuation matters. SLSER's sham $10 offer for million dollar real estate warrants no further review. SLSER raises no substantial question, nor does SLSER uncover any conflicts with decisions of this Court, other circuits, or the ICC itself. For the reasons stated, the petition for writ of certiorari should be denied.

Respectfully submitted,

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